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IN THE

Supreme Court of the United States

October Term, 1952

No. 327

KINSTON TOBACCO BOARD OF TRADE, INCORPORATED, ET AL,
Petitioners

v.

LIGGETT & MYERS TOBACCO COMPANY, a corporation; AMERICAN SUPPLIERS, INC.; IMPERIAL TOBACCO COMPANY (OF GREAT BRITAIN & IRELAND) LTD.; EXPORT LEAF TOBACCO COMPANY, a corporation; and KINSTON TOBACCO COMPANY, INC., *Respondents*

BRIEF FOR RESPONDENT IMPERIAL TOBACCO COMPANY (OF GREAT BRITAIN & IRELAND), LTD. IN OPPOSITION.

OPINION BELOW.

The opinion of the Supreme Court of North Carolina, filed June 11, 1952, is reported in Advance Sheets of North Carolina Supreme Court, No. VII, p. 737, (71 S. E. 2d. 21) (R. 347-351).

JURISDICTION.

Petitioner invokes the jurisdiction of this Court under U. S. Code, Title 28, Section 1257—State Courts, Appeal; Certiorari (p. 7 Petition).

Petitioner does not draw into question the validity of any statute and must consequently base its claim of jurisdiction of this Court on that part of the section which permits review by the Court

> ". . . when any title, right, privilege or immunity is specially set up or claimed under the Constitution treaties or statutes of, or commission held or authority exercised under, United States".

The petition cannot be allowed because the Court below based its decision on independent and adequate non-Federal grounds.

QUESTIONS PRESENTED.

In its opinion the Supreme Court of North Carolina stated the questions before that Court on the defendants' appeal as follows:

1. "Does mandatory injunction lie, under the facts in this case."
2. "Is the Kinston Tobacco Board of Trade, Inc. authorized by law to establish a fifth sale on the Kinston Market and require that each of the defendants assign buyers, with instructions to bid and purchase, on the fifth sale, substantially the same quantity of tobacco at substantially the same price as they had theretofore purchased upon each of the four sales theretofore conducted upon said Market." (R.-349)

The question numbered 3 in the petition was not raised by the Petitioner below, nor was it passed on by the North Carolina Supreme Court.

STATUTE INVOLVED.

The Petitioner as a board of trade is composed of tobacco warehousemen and tobacco buyers on the Kinston Tobacco Market and exists under an Act permitting the organization of warehousemen and tobacco buyers as a board of trade. The Act is known as the Board of Trade Act and is Chapter 106, Section 465, North Carolina General Statutes; the pertinent parts of which are as follows:

> "Tobacco warehousemen and the purchasers of leaf tobacco, at auction, on warehouse floors, are hereby authorized to organize, either as non-stock corporations, or voluntary associations, tobacco boards of trade in the several towns and cities of North Carolina in which leaf tobacco is sold on warehouse floors, at auction."
>
> "Such tobacco boards of trade as may now exist, or which may hereafter be organized, are authorized to make reasonable rules and regulations for the economical and efficient handling of the sale of leaf tobacco at auction on the warehouse floors in the several towns and cities in North Carolina in which an auction market is situated."
>
> "Membership, in good standing, in a local board of trade shall be deemed a reasonable requirement by such board of trade as a condition to participating in the business of operating a tobacco warehouse of the purchase of tobacco at auction therein."
>
> "Nothing in this section shall authorize the organization of any association having for its purpose the control of prices or the making of rules and regulations in restraint of trade."

1951 AMENDMENT

"Membership in the several boards of trade may be divided into two categories:

A. Warehousemen:

B. Purchasers of leaf tobacco other than warehousemen.

"Purchasers of leaf tobacco may be (1) participating, or (2) non-participating.

". . . non-participating members shall not participate in or have any voice or vote in the management, conduct, activities, allotment of sale time, and/or hours, the fixing of dates for the opening or closing of tobacco auction markets, or in any other manner or respect."

STATEMENT.

Tobacco warehouses for the sale of leaf tobacco at auction have been operated for many years at Kinston, North Carolina. The Imperial Tobacco Company (of Great Britain & Ireland), Ltd., hereinafter referred to as the Imperial, and the other Respondents herein had, for many years, purchased tobacco at four simultaneously conducted auction sales in as many warehouses but had not assigned a representative or employee to buy on a fifth sale at Kinston.

The Respondent Imperial was a non-participating member of the Kinston Tobacco Board of Trade. (R. 7)

On September 24, 1951, the Petitioner, purporting to act under the provisions of its Charter and of the Board of Trade Act, Chapter 106, Section 465, North Carolina General Statutes, adopted a resolution by which it sought to require the Imperial and other Respondents to assign a representative or employee to the so-called fifth sale so as to participate on all five sales "being currently conducted upon said market, with uniformity as to bidding and purchase of tobacco on each of said sales and/or on such additional sale or sales as may hereafter be duly established. (R. 18-19)

The Charter of the Petitioner is found on page 259 of the Record.

The Imperial and others did not comply with the direction of the resolution and on September 28th, 1951, the Petitioner instituted an action in the Superior Court of Lenoir County, North Carolina, to compel the Imperial and other

Respondents to attend the fifth sale and to "... participate on all five sales ... with uniformity as to bidding and purchase of tobacco on each of said sales and/or on such additional sale or sales as may be hereafter duly established." (R. 13-19)

On the complaint, treated as an affidavit, the Superior Court Judge of the District entered a temporary mandatory injunction requiring each Respondent to place a buyer on each of the five sales at Kinston: " ... with instructions and authority to engage in competitive bidding on each grade or type of tobacco reasonably comparable to the participation bidding and purchase of leaf tobacco on the four sales on which the said defendants are now participating ... " (R. 19, 22, 23)

At the hearing on the order to show cause why the injunction should not be continued the Imperial demurred to the complaint. (R. 80-83) The demurrer was overruled and the Court issued an order continuing the mandatory injunction in force pending the final hearing on the merits. (R. 152-178) Imperial excepted to the order and by appropriate appeal entries (R. 200-210) appealed to the Supreme Court of North Carolina. That Court reversed the order of the Superior Court and held that the mandatory injunction was improvidently entered and that the demurrers should have been sustained. (R. 351)

ARGUMENT.

Petitioner contends that its authority, by resolution, to require the Respondents to attend the fifth sale and purchase tobacco thereon, is derived from its Charter and the North Carolina Board of Trade Act, Chapter 106, Section 465, General Statutes.

The North Carolina Supreme Court held:

> "Neither the statute, G. S. 106,465, nor the Charter vests it with the authority it here seeks to exercise." (R. 351)

The unanimous opinion of the State Court does not rest upon the determination of any Federal question. It rests squarely upon a construction of a North Carolina statute and the charter of a North Carolina corporation. All authorities cited in support of the decision in the opinion are North Carolina cases. This brings the situation clearly within the settled rule whereby this Court will not review a State Court decision resting on an adequate and independent non-Federal ground. *Radio Station WOW, Inc.* v. *Johnson,* 326 U. S. 120; *Southwestern Bell Telephone Co.* v. *Oklahoma,* 303 U. S. 206, 212, 213.

The decision of the State Court must be accepted as controlling upon the questions of local law presented, both statutory and common. *American Railway Express Co.* v. *Kentucky,* 273 U. S. 269.

The bare averment of the Petitioner that the opinion and judgment of the Supreme Court of North Carolina will deny it rights, privilege and property, safeguarded to it under the Constitution of the United States, is not enough. There must be at least color of grounds for such averment. *City of New Orleans* v. *New Orleans Water Works Co.,* 142 U. S. 79.

The Petitioner did not set up or claim any right, privilege or immunity under the Constitution of the United States in either the Superior Court or the Supreme Court of North Carolina.

CONCLUSION.

The petition for a writ of certiorari to the Supreme Court of North Carolina should be denied.

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